THE VAST DOMAIN OF THE *RESTATEMENT (THIRD) OF TORTS*

*Vincent R. Johnson**

INTRODUCTION: BROAD TERRITORY

When I talk to foreign audiences, I often emphasize the fact that in the United States, unlike in many other countries,[1] tort law is a large and dynamic field. However, despite my pressing that point, listeners may fail to appreciate the broad scope and importance of this area of American law.

That probably is not surprising. The domain of American tort law is immense. Everyday scores of courts in dozens of jurisdictions, hand down tort decisions on a nearly endless range of issues. Indeed, a large segment of the American legal profession makes its living, in whole or in part, by litigating torts.

The tremendous territory covered by American tort law is suggested by the great amount of work still left to be done on the *Restatement (Third) of Torts*. Work on the *Restatement (Third)* has been diligently underway for roughly twenty years, and much has been accomplished. However, what I personally think of as the most

* Professor of Law and Director of the Institute on Chinese Law & Business, St. Mary's University, San Antonio, Texas.

Professor Johnson is an elected member of the American Law Institute ("ALI") and an Adviser to the ALI's new Government Ethics Project. His books include: A CONCISE RESTATEMENT OF THE LAW GOVERNING LAWYERS (Vincent R. Johnson & Susan Saab Fortney eds., 2007); SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION (2007); VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH (2010); VINCENT R. JOHNSON, MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS (4th ed. 2009); and VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW (4th ed. 2009).

1. For example, until recently China had no tort system. *See* Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 672 (2007); Zhu Yan, *The Legislative Background of Chinese Tort Law and Its Key Issues*, *in* HAFTUNGSRECHT IM DRITTEN MILLENNIUM [LIABILITY LAW IN THE THIRD MILLENIUM] 111, 112–13 (Aurelia Colombi Ciacchi et al. eds., 2009). A new tort code recently came into force. Zhong Hua Ren Min Gong He Guo Qin Quan Ze Ren Fa (中華人民共和國侵權責任法) [Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), http://www.lawinfochina.com/law/display.asp?db=1&id=7846&keyword=tort%20law (China). The new Chinese code is a brief document with ninety-two articles. A side-by-side Mandarin-English translation runs less than twenty pages, with plenty of white space.

educationally valuable parts of the *Restatement (Second) of Torts* have not yet been touched by the work on the *Restatement (Third)*.

When I advise first-year law students, I recommend that they use the various *Restatements* to help them master the subjects in tort law that are either the most elementary or the most complex. The former group includes a number of "simple" intentional torts that are often front-loaded in basic law school torts courses: battery, assault, false imprisonment, trespass to land and chattels, and conversion. The latter group encompasses several topics that, although vitally important, are so complex that they are commonly omitted from first-year torts classes and left to advanced law school courses. These topics include misrepresentation, defamation, invasion of privacy, tortious interference, injurious falsehood, and nuisance.

My advice to students reflects this line of reasoning: the *Restatement* sections dealing with the "simple" intentional torts are almost invariably clear, colorful, and easy to grasp. Those parts of the *Restatement* help students to understand the interplay of general rules and exceptions, and nicely demonstrate how factual differences drive the application of the law. In contrast, the *Restatement* sections dealing with the "advanced" subjects do a beautiful job of breaking complex subjects into manageable parts and allowing students to grapple effectively with extraordinarily challenging issues. Those issues include, among others, questions dealing with tort liability related to the exercise of free speech rights, legal protection of privacy interests, commercial deception, and the limits of business competition.

I. A PRESSING TASK

From my perspective, some of the most important and interesting work on the *Restatement (Third)* lies ahead. That is the good news. The bad news is that the task of completing the *Restatement (Third)* is becoming somewhat urgent. In the second decade of the twenty-first century, students are routinely asked by professors to restate rules that they must regard as "ancient"—sections in the *Restatement (Second) of Torts* that were published in 1965, 1977, and 1979. Those provisions were promulgated long before many of today's law students were born, and well before a host of modern technologies transformed modern life. Fortunately, in the *Restatement (Second)*, the "simple" and "advanced" areas of tort law have held up reasonably well. Nevertheless, until work on the *Restatement (Third) of Torts* is complete, it is difficult for users of the *Restatement* to even determine the currently controlling rules. A law professor may know that volume two of the *Restatement (Second) of Torts* is essentially obsolete and that volumes one, three, and four are still generally the latest word on the subjects they cover. But law students, lawyers, and judges probably do not have that same advantage in terms of differentiating which parts of the

Restatement (Second) still survive.

Moreover, there is a need to finish the *Restatement (Third) of Torts* before it is time to start the fourth. It will not be long before it is necessary to restate the law of products liability, which was the first part of the work completed for the *Restatement (Third) of Torts*.

II. THE ROAD AHEAD

It is reassuring that, as Professor Ellen Pryor explains in her article,[2] the *Restatement (Third) of Torts* working group has rejected the idea of a "*Restatement*-light" patched together from the recent projects of the *Restatement (Third)*[3] and many sections in the *Restatement (Second)* that have not been superseded. Moreover, the working group's list of the major topics that should be included in a fully integrated third *Restatement* does a good job charting the work that remains to be done by the American Law Institute ("ALI").[4] That list includes: "Intentional Torts to Persons," "Economic Torts," "Torts Relating to Land and Water," "Defamation and Privacy," "Damages for Physical and Emotional Harm," and perhaps other topics (such as complex malpractice issues).[5]

Of course, it is possible to quibble with the working group's list. The category called "Torts Relating to Interests in Land and Water" seems likely to include the law of public and private nuisance. However, treating nuisance actions as "torts relating to interests in land and water" seems destined to preempt any serious consideration of the recent judicial precedent holding that injuries related to mass-marketed products, such as handguns and lead paint, should be actionable as nuisances.[6] Nevertheless, the categories identified by the working group offer a good starting point for dividing up the remaining work.

2. *See* Ellen Pryor, Restatement (Third) of Torts*: Coordination and Continuation*, 44 WAKE FOREST L. REV. 1383, 1385 (2009).

3. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

4. *See* Pryor, *supra* note 2, at 1389.

5. *Id.*

6. *See Ileto v. Glock, Inc.*, 349 F.3d 1191, 1214 (9th Cir. 2003) (holding that victims of a shooting perpetrated by a man who purchased a gun illegally stated claims for public nuisance and negligence against manufacturers, distributors, and dealers of the firearms that were actually fired); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (holding that a city stated a public nuisance claim against handgun manufacturers, trade associations, and a handgun distributor). *But see* State v. Lead Indus. Ass'n, 951 A.2d 428, 455–58 (R.I. 2008) (holding that a nuisance claim against lead-based paint manufacturers should have been dismissed). A federal law enacted in 2005 now bars a wide range of civil liability actions against manufacturers, importers, dealers, and other sellers of firearms and ammunition, including claims based on nuisance. *See* 15 U.S.C. §§ 7901–7903 (2006). *But see Ileto v. Glock, Inc*., 565 F.3d 1126, 1146 (9th Cir. 2009) (allowing claims against an unlicensed foreign manufacturer of firearms to proceed), *cert. denied*, 130 S. Ct. 3320 (2010).

III. RECOMMENDATIONS

As a law professor, I would like to offer these thoughts to those who will lead the efforts to bring the *Restatement (Third) of Torts* to a conclusion:

First, the sections dealing with the simple intentional torts (battery, assault, false imprisonment, trespass to land and chattels, and conversion) should be revised in a way that retains the rich doctrinal complexity and clear illustrations that made the *Restatement (Second)* such a success. Any effort to reduce the number of illustrations should be avoided. Moreover, the drafters should strive for the same economy of expression that was characteristic of the illustrations in the *Restatement (Second) of Torts*. Some of the ALI's recent *Restatements* have included illustrations that, viewed from the standpoint of usefulness, are too few in number and too complex in structure. Ideally, a lawyer, law student, or judge should be able to look over the illustrations in a *Restatement* section and quickly determine if he or she is on the right track in terms of understanding the law. The illustrations should not be so nuanced, qualified, or uncertain in result that the only proper reaction from the reader is a quizzical expression and a furrowed brow.

Second, when the sections dealing with the law of misrepresentation are revised, great care needs to be taken to clarify liability issues relating to indirectly disseminated false statements. This is the most difficult part of the law of fraud and negligent misrepresentation for a law professor to teach and for students to understand. Case holdings, and the analyses offered in judicial opinions, also suggest that judges struggle with these principles. In particular, the ALI needs to address important questions of liability related to false statements deliberately disseminated via mass media. Some recent decisions have essentially reached the conclusion that it is permissible for financial and business institutions to intentionally mislead the public generally, so long as they are not aware of which particular investors will be defrauded.[7] These types of questionable decisions need to be scrutinized by the ALI. On certain related points, such as liability for false statements contained in commercial documents[8] or public filings,[9] the *Restatement (Second) of Torts* charted an intelligent course.

7. *See, e.g.*, Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 490 F. Supp. 2d 784, 820–22 (S.D. Tex. 2007). In *Enron*, the court declined to find that investors stated an action for fraud even though the main defendant, Merrill Lynch, had allegedly "cook[ed] its books" by devising fraudulent transactions to mislead investors and rating agencies, and had "issued through its analysts, even as Enron was descending into bankruptcy . . . 'buy' or 'strong buy' recommendations for Enron securities, which Merrill Lynch knew would be 'widely disseminated in the financial news media.'" *Id.* at 787.

8. *See* RESTATEMENT (SECOND) OF TORTS § 532 (1977).

9. *Id.* § 536.

However, some courts have rejected its teachings.[10] The Reporters charged with the task of revising the misrepresentation sections of the *Restatement* should muster the precedent and policy arguments that will ensure that the law of fraud holds purposeful disseminators of false statements accountable for the harm they cause.[11]

Third, in the field of defamation, there are several areas of the law that cry out for clarification: the distinctions between public and private figures,[12] and between matters of public concern and matters of private concern; the murky subject of qualified privilege; the issue of whether persons suing with respect to matters of private concern must prove that the defendant acted with negligence (or some other degree of fault) regarding the falsity of a defamatory statement; the extent to which the traditional rules on libel and slander per se remain viable; and application of the single-publication rule to defamatory websites and other Internet communications.[13]

Fourth, with respect to invasion of privacy, it is remarkable how well Dean William L. Prosser's four privacy categories,[14] articulated in the mid-twentieth century, have held up in the new Digital Age, when many invasion of privacy claims are based on electronic activities (e.g., the use of social networking websites and smart phones) that only recently have become possible. However, the privacy sections of the *Restatement (Second)* are haphazard in their treatment of issues relating to culpability. For example, the provisions on liability for appropriation of name or likeness do not address culpability.[15] In contrast, the section on false-light invasion of privacy purports to require a degree of culpability that may no longer be consistent with current constitutional jurisprudence.[16] There are also unanswered questions about whether tort liability can be imposed, consistently with the First Amendment, for invasions of privacy based on truthful disclosure of facts.[17] And

10. *See, e.g.*, Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 582 (Tex. 2001) (declining to apply RESTATEMENT (SECOND) OF TORTS § 536).

11. *See, e.g.*, Andrew R. Simank, Comment, *Deliberately Defrauding Investors: The Scope of Liability*, 42 ST. MARY'S L.J. (forthcoming 2011).

12. *See generally* Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the Times for All Seasons*, 95 KY. L.J. 649, 671–94 (2007).

13. *See* Pendergrass v. ChoicePoint, Inc., No. 08–188, 2008 U.S. Dist. LEXIS 99767, at *15 (E.D. Pa. Oct. 9, 2008) (declining to apply the single-publication rule to limited dissemination of information).

14. *See* Catsouras v. Dep't of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 387 (Ct. App. 2010) (noting the influence of William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960), and the similar analysis enshrined in RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977)).

15. *See* RESTATEMENT (SECOND) OF TORTS § 652C (1977).

16. *See* West v. Media Gen. Convergence, Inc., 53 S.W.3d 640, 647 (Tenn. 2001) (rejecting the *Restatement's* actual malice requirement "brought by private plaintiffs about matters of private concern").

17. *See* Hall v. Post, 323 N.C. 259, 268–69, 372 S.E.2d 711, 716–17 (1988) (declining to recognize the private-facts tort because of its potential conflicts

important issues must be addressed relating to what types of dissemination of information constitute the kind of publicity that will serve as the basis for invasion of privacy liability.[18]

Fifth, the *Restatement (Second)*'s treatment of tortious interference needs a top-to-bottom review. Many courts have diverged from the path charted in this area by the *Restatement (Second)*. For example, a number of courts have rejected the second *Restatement*'s view that "burdening" contractual performance should be actionable.[19] Additionally, other courts[20] have articulated financial interest privileges broader than the one recognized in the *Restatement (Second)*.[21] Current American law regarding tortious interference is very unclear about whether a defendant's "improper motive" is (1) a basis for liability separate from the use of "improper means," (2) a factor which tips the balance in the assessment of whether conduct is unprivileged, or (3) simply irrelevant to issues of liability.[22] The *Restatement (Third)* needs to grapple with and clarify the tangled mass of precedent that courts and lawyers now face in the field of tortious interference with contract and prospective advantage.

Sixth, the *Restatement (Second)'s* provisions relating to malicious prosecution and related actions have always seemed too complex. They need to be revised to clarify these difficult causes of action and their relationship to recent developments, such as the increasing use of anti-SLAPP laws.[23]

Finally, the *Restatement (Third)* must chart a prudent course with respect to an issue that formed no significant part of the *Restatement (Second)*, namely the recently recognized and much litigated "economic loss rule."[24] Court decisions addressing this subject are being issued so frequently that it may qualify as the

with the First Amendment); *see also* Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997) (refusing to recognize disclosure actions due to conflict with the "truth-in-defense" provisions of the Indiana Constitution).

18. *See* Yath v. Fairview Clinics, N.P., 767 N.W.2d 34, 42 (Minn. Ct. App. 2009) (differentiating two types of publicity).

19. *See, e.g.*, Price v. Sorrell, 784 P.2d 614, 616 (Wyo. 1989) (rejecting RESTATEMENT (SECOND) OF TORTS § 766A (1979)).

20. *See, e.g.*, RAN Corp. v. Hudesman, 823 P.2d 646, 649 (Alaska 1991) (recognizing a financial-interest privilege that protects more than investments).

21. *See* RESTATEMENT (SECOND) OF TORTS § 769 (1979).

22. *See* VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 425–28 (2010) (discussing the role of motive in the law of tortious interference).

23. *See* LoBiondo v. Schwartz, 970 A.2d 1007 (N.J. 2009). *LoBiondo* involved a claim alleging malicious use of process. It arose from a SLAPP (Strategic Lawsuit Against Public Participation) defamation suit. Under the law of many states, SLAPP actions are subject to early dismissal because of the protections afforded by the First Amendment to speech on public issues. The New Jersey Supreme Court referred to the claim of malicious use of process as a "SLAPP-back suit."

24. *See generally* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 524 n.1 (2009) (collecting examples of recent scholarship).

"hottest" topic in modern tort law. As Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court noted, at "the current pace, the economic loss doctrine may consume much of tort law if left unchecked."[25]

IV. TRACING THE BOUNDS OF THE REALM

As these few points suggest, the *Restatement (Third) of Torts* is still far from finished, and this task may not be concluded for many years. Perhaps this is what makes American tort law such an interesting field.

The challenge of effectively restating the common law of torts has long been a great one. However, the work facing the current generation of ALI scholars may be no more challenging than what was required in the past. As a writer remarked almost a century ago about English contributions to Anglo-American law, it was at times "more difficult for jurists to state this branch of the law scientifically than for judges to make the law itself. Writers on the law were like map-makers whose rulers conquer territory so rapidly that the bounds of their realms cannot be traced."[26]

Perhaps not much has changed in the vast domain of tort law.

25. Grams v. Milk Prods., Inc., 699 N.W.2d 167, 181 (Wis. 2005) (Abrahamson, C.J., dissenting).

26. Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 5 (1927).